1989

Reagan Outdoor Advertising Inc., Douglas Madsen v. Utah Department of Transportation : Petition for Writ of Certiorari

Utah Supreme Court

Douglas T. Hall; Attorney for Petitioner.
Ralph L. Finlayson; Assistant Attorney General; Attorneys for Respondent.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

REAGAN OUTDOOR ADVERTISING, INC. and DOUGLAS MADSEN,	)	
Petitioners,	)	Supreme Court No.
vs.	)	890478
UTAH DEPARTMENT OF TRANSPORTATION,	)	Category 13
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

Petition From an Order of the
Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

REAGAN OUTDOOR ADVERTISING, INC. and DOUGLAS MADSEN,	)	
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QUESTIONS PRESENTED FOR REVIEW

1. Did the Utah Court of Appeals err in dismissing Reagan Outdoor Advertising's (hereinafter "Reagan") petition for a review of an administrative ruling when a notice of appeal was timely filed with the administrative agency, although not timely filed with the Court of Appeals?

2. Did the Utah Court of Appeals err in holding that the Utah Department of Transportation (the administrative agency), while conducting a "formal adjudicative proceeding", is not the equivalent of a "court?"

OPINION OF THE UTAH COURT OF APPEALS

The Court of Appeals dismissed Reagan's petition for review as untimely filed. The full opinion of this order is at page A-1 of the Appendix.

STATEMENT OF JURISDICTION

The Utah Court of Appeals entered its decision in this matter on October 16, 1989. Section 78-2-2 (5) of the Utah Code (1989) confers jurisdiction on this Court to review the Court of Appeal's decision by a writ of certiorari.

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES and REGULATIONS

Pertinent provisions in this case come from the Utah Code and the Rules of the Utah Court of Appeals. They are

to be found at Section 63-46b-16 (2) (a) of the Utah Code (1988) and Rules 4 (a) and 14 (a) of the Rules of the Utah Court of Appeals; the full texts of which are included in the appendix.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

By a notice dated January 11, 1989, the Utah Department of Transportation, District One (hereinafter "UDOT"), advised Reagan that an outdoor advertising structure it maintains at approximately 287 South Main in Layton, Utah, and is also adjacent to the west side of I-15, near milepost 332.87, was in violation of the Utah Outdoor Advertising Act, specifically, section 27-12-136.5 of the Utah Code (1989), in that the structure was less than 500 feet distance from a previously existing outdoor advertising sign. Reagan disputed this allegation and requested a hearing as directed by the UDOT notice.

A hearing was held on May 8, 1989, before Mr. Clinton D. Topham, the District One director. The director ruled in favor of UDOT, determining that pursuant to measurements taken along the highway right of way line as directed by paragraph 1 of section VII of UDOT regulations the Reagan sign was less than 500 feet from a previously existing

sign. A written order incorporating the director's findings was entered on June 19, 1989.

Reagan requested reconsideration of the director's finding and submitted that it had evidence, pursuant to a site survey, that the sign was more than 500 feet distance as measured along the highway right of way line. This request was summarily denied by Mr. Topham on July 13, 1989.

Reagan thereafter filed a Notice of Appeal of the UDOT ruling with the District One director, Mr. Topham, on August 14, 1989. The Petition for Review to the Utah Court of Appeals was filed August 27th (or 28th), 1989, after the Notice of Appeal was returned by UDOT to Reagan. On October 16, 1989, pursuant to a UDOT motion to dismiss, the appeal was dismissed by the Utah Court of Appeals.

STATEMENT OF MATERIAL FACTS

1. Reagan's appeal of the administrative ruling was originally filed, admittedly with the UDOT agency, on August 14, 1989; which was a timely filing under section 63-46b-14 (3) (a) of the Utah Code (1988) and Rule 6 (a) of the Utah Rules of Civil Procedure. At this time an appeal bond in the amount of $300.00 was also filed and the court fee for an appeal tendered.

2. Reagan filed its Petition for a judicial review of the agency proceeding with the Utah Court of Appeals on August 28, 1989, according to section 63-46b-16 of the Utah

Code (1988). This was, admittedly, more than thirty days from the agency order denying Reagan's request for reconsideration.

ARGUMENT

This case has been handled pursuant to the Utah Administrative Procedures Act, Section 63-46b et seq. of the Utah Code Annotated (1953 as amended), which first became effective on January 1, 1988. It was originally heard before the Utah Department of Transportation ("UDOT"), District One, sitting in Ogden, Utah, Clinton D. Topham, P.E., District One Director, presiding, and allegedly conducted pursuant to the procedures for "formal" adjudicative proceedings. Sections 63-46b-6 through 10 of the Utah Code (1987-88).

Certainly, UDOT, District One, under these circumstances, sat as a Court, both by definition and by statute. Black's Law Dictionary, 5th Ed. 318 (1979), ("An organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it . . ."); Section 63-46b-1 (1) (a), supra, ("[A]ll state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons . . .") It should be viewed, and treated, as such.

The original Notice of Appeal filed with Department One of UDOT was also served upon the Respondent, the Utah

Department of Transportation, and follows virtually the same format and contains the same information as the Petition for Review filed in this Court. In reality these two documents represent the same thing, by whatever title they are called. The purpose of Rules 4 and 14 of the Rules of the Utah Court of Appeals are fulfilled by either document.

The original "Notice of Appeal" was filed August 14, 1989. This was a Monday. It was accepted for filing, at that time, by UDOT. Whether under Rule 4 or 14 of the Rules of the Utah Court of Appeals the "Notice of Appeal" (or "Petition for Review") was to be filed within 30 days. Thirty days from July 13th, the date of the "Court's" order, was August 12th, but this was a Saturday. Under Rule 6 (a) of the Utah Rules of Civil Procedure Saturdays, Sundays and legal holidays shall not be computed in the last day of the pertinent time period. Filing on Monday, the 14th, was therefore timely.

The only real issue for review under the instant motion is whether or not the filing of the "Notice of Appeal" (which was included for information purposes in the filing to the Court of Appeals with the "Petition for Review") at the District One UDOT offices, rather than immediately with the Utah Court of Appeals, sufficiently complies with the purpose and intent of the statutes to invest this Court with jurisdiction in this matter. The purpose of a "Notice of Appeal" or "Petition for Review" is the same; to give notice

of an intent to appeal. Wood v. Turner, 18 Utah 2d 229, 419 P.2d 634 (1966). See also, Associates Financial Services v. Sevy, 776 P.2d 650, 111 Utah Adv. Rep. 63 (CA 1989) and Black's, supra, at 958. Reagan has complied with these express purposes.

In the Wood case, supra, the Utah Supreme Court held:

> Our Constitution assures the right of appeal in all cases to the end that claims errors or abuses may be reviewed by another tribunal. It is usually held that statutes implementing the right of appeal are liberally construed and applied in the furtherance of justice; and that an interpretation which will prevent that right from being exercised is not favored. The purpose of a notice of appeal is to advise the opposite party that the appeal has been taken and of the essential requisites thereto. If it does so in substance, it should be given effect and mere technical defects should not defeat the right of appeal. (Emphasis added.)

Id.

In the recent case of Associates Financial Services v. Sevy, supra, this Court held that, "[T]he purpose of the notice of appeal is fundamentally to give notice that an appeal has been taken . . ."] (Finding that no party was misinformed by the error.)

Furthermore, Reagan, in the instant case, has substantially complied with the statute. "Substantial compliance" means that the spirit of the procedural or jurisdictional requirements have been satisfied in that the intent for which the statute was adopted have been carried

out in light of the facts of each particular case. Patterson v. Dept. of Labor, 678 P.2d 1262 (Wa. 1984). See also, Gutierrez v. City of Albuquerque, 631 P.2d 304, 96 N.M. 398 (1981), ("Substantial compliance has occurred when the statute has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute.")

Illustrative of this is Las Vegas Plywood and Lumber, Inc., v. D & D Enterprises, 649 P.2d 1367, 98 Nev. 378 (1982). In this case the appellant did not strictly comply with Nevada's mechanics lien statute in that it failed to post a copy of the notice of lien on the property subject to the lien. However, the appellant did mail a copy of the notice to the respondent. This did not fully comply with the statutory requirements. The Nevada Supreme Court ruled that appellant had substantially complied because the respondent received actual notice pursuant to the mailing.

In reaching its decision the Nevada court stated:

> The spirit and purpose of the [mechanic's lien statute] is to do substantial justice to all parties who may be affected by its provisions; and that courts should avoid "unfriendly strictness and mere technicality. This rule should always be followed where the objections urged serve only to perplex and embarrass a remedy intended to be simple and summary. . .

Id. at 1371. See also, People v. Greathouse, 742 P.2d 334 (Colo. 1987). (Notice of appeal was filed within the prescribed time frame but in the wrong court and was

therefore alleged to be untimely. The Colorado Supreme Court allowed the appeal because either court bestowed jurisdiction.)

Two cases were cited by UDOT in its motion before the Court of Appeals to dismiss Reagan's Petition for Review. Neither of the cases cited have direct application to the instant matter. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984), dealt with the issue of a failure to remit the requisite filing fee for an appeal at the time the notice of appeal was filed. In the instant case the filing fees were tendered at the same time as the Notices were filed.

In Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970), the Supreme Court ruled that a district court could not subsequently confer jurisdiction upon the Supreme Court once the Supreme Court had once dismissed an appeal. (Plaintiffs filed motion to dismiss appeal; defendants did not respond and appeal was dismissed. Later, defendants attempted to procure relief from late filing on motion for new trial in district court.)

CONCLUSION

This case is believed to be the first appeal taken from a ruling of the Department of Transportation under the relatively new Administrative Procedures Act. The Respondent, the Utah Department of Transportation, was

timely notified that Reagan was appealing the decision of UDOT, Department One. (After all, they are the same entity anyway.)

Although Rule 14 of the Rules of this Court provides for direct filing of appeals to it and not to the agency most appeals are filed directly with the court from which the appeal is being taken. Rule 4 (a) of the Rules of the Utah Court of Appeals. UDOT, District One, in this case was most certainly acting in the capacity of a court of law. The agency, UDOT, accepted the filing. (They were apparently not then aware of the provisions of Rule 14, either, being new to having to deal with appeals.) Had they not accepted the filing and advised Reagan of this Reagan would have taken the notice to the Court of Appeals. Reagan immediately filed in the Court of Appeals once the mistake was discovered.

Despite this oversight adequate notice to the other party, the Respondent, has been given. The purpose of the notice provisions have been complied with; and, under the circumstances, Rule 14 of the Rules of the Utah Court of Appeals has been substantially complied with, Reagan should be allowed to proceed with its appeal, and this Court should deny Respondent's Motion to Dismiss.

RESPECTFULLY submitted this 15th day of November, 1989.

Douglas T. Hall
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) copies of the foregoing Petition to Ralph L Finlayson, attorney for Respondent, at 236 State Capitol, Salt Lake City, Utah 84114, first class postage prepaid this 15th day of October, 1989.

APPENDIX

IN THE UTAH COURT OF APPEALS

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Reagan Outdoor Advertising, Inc., and Douglas Madsen,	)	
Petitioners,	)	ORDER OF DISMISSAL
v.	)	Case No. 890511-CA
Utah Department of Transportation,	)	
Respondent.	)	

Before Judges Orme, Garff and Davidson (On Law and Motion).

Upon respondent's motion to dismiss the petition for review as untimely filed, it appearing that the petition was not properly filed under R. Utah Ct. App. 14(a) until July 28, 1989, and that the filing of a notice of appeal with the administrative agency is without efficacy under Utah Code Ann. § 63-46b-16(2)(a) (1989), said motion is hereby granted.

The Department of Transportation is not the equivalent of a "court" within the meaning of R. Utah Ct. App. 4(a) and the A.L.J. does not conduct a hearing as a "court of law." See R. Utah Ct. App. 18. Appeal from a formal administrative adjudication is by original petition to the appellate court under R. Utah Ct. App. 14. The filing of a petition for review commences the judicial proceeding. In the absence of petitioner's timely compliance with Rule 18, this court lacks jurisdiction to review the administrative decision. See also R. Utah Ct. App. 4C (limiting the transfer of misfiled appeals and petitions to the supreme court and the court of appeals.)

The above-entitled appeal from an adjudication of the Department of Transportation is dismissed as untimely filed.

DATED this 16th day of October, 1989.

FOR THE COURT:

Gregory K. Orme, Judge

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law

Rule 4. Appeal as of right: When taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from.

TITLE III. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, COMMISSIONS, AND COMMITTEES.

Rule 14. Review of administrative orders: How obtained; intervention.

(a) **Time for filing petition for review of administrative order.** When judicial review by this court of an order or decision of an administrative agency is provided by statute, a petition for review shall be filed with the clerk of the Court of Appeals within the time prescribed by statute or, if there is no time prescribed, within 30 days after the date of the order or decision. The term "agency" includes commission, board, committee, or officer.

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Attorney for Petitioner

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION, Complaintant and Respondent,	)	PETITION FOR REVIEW
vs.	)	
REAGAN OUTDOOR ADVERTISING, INC., Petitioner, and DOUGLAS MADSEN, Respondents.	)	Docket No. 890511-CA

COMES NOW the Petitioner, R.O.A. General, Inc., dba Reagan Outdoor Advertising, through counsel, and pursuant to Rule 14 of the Rules of the Utah Court of Appeals, and hereby Petitions the Utah Court of Appeals for a review of the Order of the Utah Department of Transportation, District One, revoking Appellant's sign permit and ordering the removal of Appellant's sign, dated June 19th, 1989, the Order denying Petitioner's objection to the form of the Order, dated June

19, 1989, and the Order denying Appellant's Request for Reconsideration, dated July 13, 1989.

DATED this 28th day of August, 1989.

Douglas T. Hall
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Notice of Appeal to be mailed to Ralph L. Finlayson, Assistant Attorney General and attorney for the Complaintant/Respondent, at 236 State Capitol, Salt Lake City, Utah 84114, and to Douglas Madsen, the other, original named Respondent, at 1670 Church Street, Layton, Utah 84041, first class postage prepaid, this 28th day of August, 1989.

DOUGLAS T. HALL
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Telephone: (801) 521-1775

Attorney for Appellant

BEFORE THE DEPARTMENT OF TRANSPORTATION, DISTRICT ONE

UTAH DEPARTMENT OF TRANSPORTATION, Complaintant, vs. REAGAN OUTDOOR ADVERTISING, INC., and DOUGLAS MADSEN, Respondents.	)	NOTICE OF APPEAL

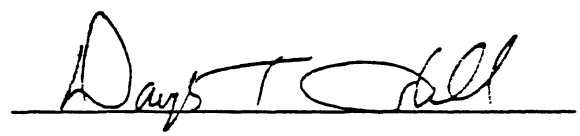
COMES NOW the respondent, Reagan Outdoor Advertising, through counsel, and pursuant to the Rules of the Utah Court of Appeals, and hereby gives notice of its appeal to the Utah Court of Appeals from the Orders of the Utah Department of Transportation, District One, revoking Appellant's sign permit, ordering the removal of Appellant's sign, and denying Appellant's Request for Reconsideration, dated July 13, 1989.

DATED this 14th day of August, 1989.

Douglas T. Hall
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Notice of Appeal to be mailed to Ralph L. Finlayson, attorney for the Complaintant, at 236 State Capitol, Salt Lake City, Utah 84114, first class postage prepaid, this 14th day of August, 1989.



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Attorney for Appellant

BEFORE THE DEPARTMENT OF TRANSPORTATION, DISTRICT ONE

UTAH DEPARTMENT OF TRANSPORTATION, Complaintant, vs. REAGAN OUTDOOR ADVERTISING, INC., and DOUGLAS MADSEN, Respondents.	NOTICE OF FILING APPEAL BOND

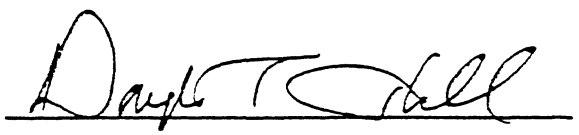
COMES NOW the respondent, Reagan Outdoor Advertising, through counsel, and pursuant to Rule 6 of the Rules of the Utah Court of Appeals, and hereby gives notice of filing a cost bond on appeal in the amount of $300.00 with the above-entitled agency.

DATED this 14th day of August, 1989.

Douglas T. Hall
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Notice of Filing Appeal Bond to be mailed to Ralph L. Finlayson, attorney for the Complaintant, at 236 State Capitol, Salt Lake City, Utah 84114, first class postage prepaid, this 14th day of August, 1989.



18 Utah 2d 229

Virgil L. WOOD, Plaintiff,
v.
John W. TURNER, Warden, Utah State Prison, Defendant.
No. 10471.

Supreme Court of Utah.
Aug. 10, 1966.

Proceeding on motion to dismiss plaintiff's appeal from a denial of petition for writ of habeas corpus by the Third District Court, Sale Lake County, A. H. Ellett, J. The Supreme Court, Crockett, J., held that the premature filing of a notice of appeal from denial of petition for writ of habeas corpus, made within one month after trial court had stated that petition was denied but before the signing and filing of a formal judgment, was not a defect which would ipso facto deprive appellate court of jurisdiction, but an irregularity which could be ground for dismissal of appeal within discretion of court; however, since written judgment as filed was in accord with ruling appealed from the ends of justice would be best served by hearing case on its merits.

Motion to dismiss appeal denied.

1. Appeal and Error ⇐411, 422

Purpose of notice of appeal is to advise opposite party that the appeal has been taken and of the essentials requisite thereto, and notice which does so in substance should be given effect so that mere technical defects will not defeat right of appeal. Rules of Civil Procedure, rules 61, 73(a); Const. art. 8, § 9.

2. Habeas Corpus ⇐113(6)

The premature filing of a notice of appeal from denial of petition for writ of habeas corpus, made within one month after trial court had stated that petition was denied but before the signing and filing of a formal judgment, was not a defect which would ipso facto deprive appellate court of jurisdiction, but an irregularity which could be ground for dismissal of appeal within discretion of court; however, since written judgment as filed was in accord with ruling appealed from the ends of justice would be best served by hearing case on its merits. Rules of Civil Procedure, rule 61, 73(a); U.C.A.1953, 68-3-2, 77-40-3, 77-42-1; Const. art. 8, § 9.

3. Appeal and Error ⇐337(2)

The remedy of dismissal of appeal because of premature filing thereof would be well advised in cases where judgment had not become definite or had not become final, or where remedies before trial court had not been exhausted. Rules of Civil Procedure, rules 61, 73(a); Const. art. 8, § 9.

Jimi Mitsunaga, John D. O'Connell, Salt Lake City, for appellant.

Phil L. Hansen, Atty. Gen., Ronald N. Boyce, Asst. Atty. Gen., Salt Lake City, for respondent.

CROCKETT, Justice.

Defendant, Warden of the Utah State Prison, moved to dismiss plaintiff's appeal from a denial of a petition for writ of habeas corpus.

The plaintiff, Virgil L. Wood, having been found guilty of the crimes of robbery and grand larceny by a jury on April 30, 1963, was sentenced to indeterminate terms in the Utah State Prison as provided by law for those crimes; sentences to run consecutive to one the plaintiff was then serving. A motion for a new trial was made and denied. On September 9, 1965 plaintiff filed a petition for a writ of habeas corpus in the District Court of the Third Judicial District of Salt Lake County, State of Utah. The matter was heard on September 30, 1965, at the conclusion of which the court stated that the petition was denied. This is indicated in the record. Within the one month allowed for appeal under Rule 73(a), U.R.C.P., to wit, on October 1, 1965 the plaintiff duly served and filed a notice of appeal. Four days thereafter, on October 5, 1965, there was signed and filed a formal judg-

ment denying the petition. Defendant contends that the plaintiff's notice of appeal having thus been filed prematurely, this court is without jurisdiction to entertain the appeal.

It is true that this court has previously held that the filing of a notice of appeal *after* the expiration of the one month allowed by the rule is a jurisdictional defect.[1] Our conclusion in this case represents no departure from that holding. But counsel has not cited, nor has our research discovered any case which has ruled that the *premature* filing of a notice of appeal deprives this court of jurisdiction.

[1] Our Constitution assures the right of appeal in all cases to the end that claimed errors or abuses may be reviewed by another tribunal.[2] It is usually held that statutes implementing the right of appeal are liberally construed and applied in the furtherance of justice; and that an interpretation which will prevent that right from being exercised is not favored.[3] The purpose of a notice of appeal is to advise the opposite party that the appeal has been taken and of the essentials requisite thereto. If it does so in substance, it should be given effect and mere technical defects should not defeat the right of appeal.[4] This is in accord with the generally desirable objective of not placing undue stress on technicalities where others are not adversely affected. Rule 61, U.R.C.P. provides that, "* * * no error or defect in * * * anything done or omitted by the court or by any of the parties, is ground for * * * disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."[5]

[2, 3] The premature filing of the notice of appeal such as was done in this case should not be regarded as a defect which will ipso facto entirely deprive the appellate court of jurisdiction. It is an irregularity which would be grounds for dismissal of the appeal within the discretion of the court. Such remedy would undoubtedly be well advised in the cases where the judgment had not become definite, or had not become final, or where remedies before the trial court had not been exhausted. No such circumstance exists here. The final written judgment which was filed is exactly in accord with the ruling appealed from. We cannot see that the defendant was put to any disadvantage or that his rights were adversely affected by the irregularity of procedure here. It is our opinion that the ends of justice will best be served by hearing the case on its merits.

The motion to dismiss the appeal is denied.

McDONOUGH and CALLISTER, JJ., concur.

WADE, J., heard the arguments but died before the opinion was filed.

HENRIOD, Chief Justice (commenting).

The main opinion in this case, presumably presented and designed for publication in the national reports system, is premature.

The matter is before us on *motion to dismiss the appeal*,—not on a regular appeal, under the Rules, from a final judgment. It would be a dangerous precedent if we presumed to pen a definitive and conclusive decision on any or all motions to dismiss an appeal.

1. See Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955).
2. Constitution of Utah, Article VIII, § 9.
3. Sutherland Statutory Construction, 3d Ed. § 6807.
4. See Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798 (1964); Price v. Western Loan and Savings Company, 35 Utah 379, 100 P. 677 (1909).
5. Secs. 77-40-3 and 77-42-1, U.C.A.1953, require that all errors which do not affect the substantial rights of the parties must be disregarded; and § 68-3-2 provides: "The statutes * * * of this state * * * and all proceedings under them are to be liberally construed with a view to effect the objects of the statute and to promote justice. * * *"

The danger of the main opinion, if published as our official decision, laying down a rule of law under the facts of this case, is that it would reverse many decisions of this court to the effect that there can be no appeal except from a *final judgment* of the lower court.[1] At the time of filling notice of appeal in this case, clearly, obviously and chronologically there was no *final judgment* in the record, as the main opinion concedes. The reasoning seems to be that, "Well, no one was hurt, so let's ignore the rules and our cases."

The same reasoning could have been entertained in the cases cited in footnote one hereof, but wasn't. The same reasoning could have been indulged in Anderson v. Anderson,[2] where notice of appeal was filed only one day late,—even though no party to the appeal felt it was injured by the delay, but where this court, without anyone asking it to say so, said whether anyone was injured or not, the matter was jurisdictional, *and that this court had no jurisdiction to hear the matter.*

The cases in footnote one, and the Anderson case, with respect to fundamental principles, are identical to this case so far as jurisdictional concepts are concerned. If the main opinion is documented and published as the most recent pronouncement of the law in this state, in my opinion the rules with respect to 1) appeals from *final judgments,* and 2) the time within which to file them, are impotent, flatulent and no longer controlling.

I have difficulty in agreeing wholeheartedly with the main opinion's statement that the "notice of appeal is to advise the opposite party that the appeal has been taken and of the essentials requisite thereto,"—if that means that this is the only reason for such notice. This is a disarming statement, which, if true, would have required that the cases in footnote one herein should have been decided contrariwise, and that Anderson v. Anderson, supra, was erroneously decided. In my opinion, the main opinion's quoted statement is only adjunct, not controlling, as to the main purpose of the notice of appeal,—to preserve a right and to preserve the jurisdictional status of the courts, —not simply to apprise adversary parties of the fact that an appeal has been taken. Most times people know this by newspaper, radio, television, and often by word of mouth or by inquiry of counsel for him who might be a respondent.

I strongly urge that the main opinion not be published, since 1) it is a result arising not out of a regular appeal where the whole record would be before us, but only on a motion to dismiss, and 2) it will upset all the cases we have decided with respect to appeals from final judgments, and 3) would reverse Anderson v. Anderson.

I vote to grant the motion to dismiss, on statutory and precedential grounds.

1. See cases in Note 27, to Rule 72(a), Utah Rules of Civil Procedure, Vol. 9, p. 782, Utah Code Annotated 1953; Everett v. Jones, 32 Utah 489, 91 P. 360 (1907); Candland v. Mellen, 46 Utah 519, 151 P. 341 (1915); Haslam v. Paulsen, 15 Utah 2d 185, 389 P.2d 736 (1964).

2. 3 Utah 2d 277, 282 P.2d 845 (1955).

1 Dean E. Conder, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(1)(j) (1987).

2. *Resource Management Co. v. Weston Ranch and Livestock Co.*, 706 P.2d 1028, 1047 (Utah 1985) (citation omitted) *see, Garff Realty Co. v. Better Buildings, Inc.*, 120 Utah 344, 234 P.2d 842, 844 (1951).

3. The requirement that the event occur after formation of the contract distinguishes a case of supervening impossibility, such as this, from a case in which the contract cannot be performed because of a mistake, an unknown legal requirement, or other fact in existence at the time the contract is made. *See Quagliana v. Exquisite Home Builders, Inc.*, 538 P.2d 301, 305-08 (Utah 1975); *Sine v. Rudy*, 27 Utah 2d 67, 493 P.2d 299 (1972); *Mooney v. GR and Assoc.*, 746 P.2d 1174, 1176 (Utah App. 1987).

4. *See Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978) ("[A] party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible"; the defense did not prevail because evidence was insufficient); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966); Restatement (Second) of Contracts section 261; J. Calimari & J. Perillo, *Contracts*, 476 *et seq.* (2d ed. 1977); Utah Code Ann. §70A-2-615(a) (1980) establishes the impossibility defense in contracts for the sale of goods.

5. We recognize that the City's failure to approve seems, from our present perspective, to be rather easy to foresee. However, the critical fact is not whether the event *could* have been foreseen, but rather, whether the parties *actually did* foresee it and provide accordingly in their contract. A dictum in one Utah case on impossibility employs the word "unforeseeable" in describing the event causing impossibility, *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d at 61 (Utah 1978); however, the better and more widely accepted rule looks not to whether the parties could or should have foreseen the event, but rather whether, as a fact of assent, they did foresee it. Restatement (Second) of Contracts §261 & comment b (1981).

6. The trial court made no finding expressly determining when performance became impossible; however, since the parties do not contest the matter of timing, we presume the trial court's decision to be correct in this regard. We therefore do not consider whether the award of rent for the period preceding abandonment was erroneous, because the cross-appeal of that award is based solely on the argument that Nichols erred in executing the lease, an argument which we rejected above.

7. *See, Castagno v. Church*, 552 P.2d 1282 (Utah 1976); Restatement (Second) of Contracts §265 (1981); J. Calimari & J. Perillo, *Contracts*, 495-96 (2d ed. 1977).

8. We distinguish *Jespersen v. Deseret News Publishing Co.*, 119 Utah 235, 225 P.2d 1050 (1951) and *General Ins. Co. of America v. Christiansen Furniture Co.*, 119 Utah 470, 229 P.2d 298 (1951) because they are based on an argument not raised below or in this court. At common law, the application of the usual contract defenses to a covenant to pay rent was limited. We do not reach the question whether this rule could apply in this case, because it has not been argued.

Cite as
111 Utah Adv. Rep. 63

IN THE UTAH COURT OF APPEALS

ASSOCIATES FINANCIAL SERVICES COMPANY OF UTAH, INC.,
Plaintiff and Respondent,
v.
Harold SEVY; Winona R. Sevy; Security Title Company of Southern Utah, as Trustee; and John Does I through V,
Defendants and Appellants.

No. 880459-CA
FILED: June 21, 1989

Fifth District, Iron County
Honorable J. Philip Eves

ATTORNEYS:

Robert F. Orton, Virginia Curtis Lee, Salt Lake City, for Appellants

Willard R. Bishop, Cedar City, for Respondent

Before Judges Conder,[1] Garff, and Greenwood.

OPINION

CONDER, Judge:

The Defendants Harold and Winona Sevy appeal from a judgment of the district court permitting Associates Financial Services Company of Utah ("Associates") to foreclose their interest in certain irrigation company stock. We affirm.

In 1981, the Sevys sold about thirteen acres of land in Garfield County to Kyle and Cindy Stewart, along with 39 shares of the Long Canal Company, which for many years had furnished irrigation water to the land.[2] To secure payment of the purchase price, the Sevys were beneficiaries of a trust deed covering both the land and the irrigation company stock. The trust deed was duly recorded. The Long Canal Company issued a stock certificate for the 39 shares in the names of the Stewarts, and this stock certificate remained in the Stewarts' possession.

In 1985, the Stewarts obtained a loan from the Lockhart Company, pledging the canal company stock as collateral. The Lockhart Company took possession of the stock certificate and filed a financing statement covering the stock. A year later, the Stewarts refinanced their loan and borrowed from Lockhart additional funds secured by the same collateral, bringing the total principal debt to $12,213 at 16.5% interest. Lockhart thereafter assigned the loan and security interest, and transferred possession of the stock certificate, to Associates.

Stewarts filed a petition in bankruptcy, and the trustee abandoned the irrigation company stock. Associates thereupon sued to establish the priority of its security interest in the stock. The trial court concluded that the stock was appurtenant to the land and that the Sevys' security interest would thus have priority superior to that of Associates, but that the Sevys were estopped from asserting the priority of their security interest because they permitted the Stewarts to retain possession of the stock certificate. Judgment was accordingly entered on November 4, 1987[3] permitting Associates to foreclose the Sevys' security interest.

The Sevys filed notice of appeal designating the Court of Appeals as the appellate court. The Iron County Clerk treated the appeal as to the Supreme Court, and further filings and motions prior to briefing were made in the Supreme Court. The case was eventually transferred by the Supreme Court to this Court.

Associates asserts a lack of appellate jurisdiction based on the fact that the notice of appeal indicates that the appeal is taken to the Court of Appeals. Appellate jurisdiction in this type of case is properly in the Supreme Court,[4] and therefore, the Sevys' notice of appeal was incorrect in stating that the appeal was taken to the Court of Appeals. However, the rules of both Courts recognize that such an error is inconsequential.[5] Moreover, the error caused no real harm in this case, because all filings and proceedings on appeal were before the Supreme Court until the case was transferred here, despite the error on the notice of appeal. Since the purpose of the notice of appeal is fundamentally to give notice that an appeal has been taken,[6] and since no party or court seems to have been misinformed by the error, we find that the notice of appeal is sufficient to establish appellate jurisdiction, despite the error in specifying the appropriate appellate court.

We turn to the question of the relative priorities of the parties' security interests[7] in the irrigation company stock, a question of first impression. The trial court based its decision that the Sevys had superior priority on a line of cases interpreting Utah Code Ann. §73-1-10 (1980), which states that water rights "represented by shares of stock in a corporation .... shall not be deemed to be appurtenant to the land ...." Those words have been held to create a mere presumption that irrigation company stock is not transferred with a conveyance of the land to which the stock has provided water, and the presumption is rebuttable by clear and convincing evidence.[8] All of these cases involved a conveyance of full title rather than creation or priority of a security interest, the issue being whether the irrigation stock was included in a conveyance of the land on which the water was used.

Applying the case law just described to establish superior priority in the Sevys would be at variance with the priority structure prescribed by Article 9 of the Utah Uniform Commercial Code. Priority under Utah Code Ann. §70A-9-312(5) (1980) is determined generally according to the date on which the security interest is perfected. For an "instrument" such as a certificated security, perfection is accomplished by possession of the certificate evidencing the security, except for a 21-day period of automatic perfection immediately after attachment of the security interest.[9] The Sevys did not take possession of the irrigation company stock certificate, and thus did not perfect their security interest in the irrigation company stock. Therefore, under Article 9, their priority is inferior to that of Associates, whose predecessor took possession of the certificate and transferred possession of it to Associates.

For Article 9 to apply, the irrigation company stock must fall within the definition of an "instrument," which is defined in Utah Code Ann. §70A-9-105(1)(i) as including a "security." "Security" is in turn defined in §70A-8-102(1)(a), which provides:

> (a) A "security" is an instrument which (i) is issued in bearer or registered form; and (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and (iii) is either one of a class or a series or by its terms is divisible into a class or series of instruments; and (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

The stock here in question appears to be issued in registered form as some of a series or classes of corporate stock, and the stock certificate evidences a share in the irrigation enterprise of the Long Canal Company. The Sevys assert, however, that the stock is not "of a type commonly dealt in upon securities exchanges or markets or commonly recognized in [Utah] as a medium for investment." We are nevertheless of the opinion that irrigation company stock is a "medium of investment." It may be true that there is no established stock exchange or institutionalized market for trading in irrigation company stock in Utah. However, the stock of an irrigation company ordinarily embodies its capital, provides a return to its owners in the form of water use, and was the means by which it amassed the resources to obtain its water rights and build its water transport and distribution system. It is accordingly a medium of investment.

In holding that Article 9 establishes the superior priority of Associates' security inte-

rest, we distinguish the line of cases holding that stock in an irrigation company may be appurtenant to, and impliedly conveyed with, an interest in real property. The rule of those cases does not apply to the creation and perfection of security interests in irrigation company stock. This conclusion is grounded in the rule that a later statute supersedes an earlier statute if the two are in conflict,[10] inasmuch as the Uniform Commercial Code, enacted in 1965 in Utah, followed in time section 73-1-10 of Utah Code Ann., which was last amended in 1959. Moreover, in view of the importance of uniformity and predictability in commercial law,[11] we favor a result which will not have the effect of creating an exception to the Article 9 priority structure for something which has the appearance of fitting rather clearly within that structure. We also note, as the trial court did, that it is equitable, as between Sevys and Associates, that the loss resulting from the double collateralization fall upon the Sevys, who, albeit unwittingly, left the Stewarts in the position to again borrow on the stock.

We therefore hold that the security interest of Associates in the irrigation company stock is prior to the unperfected security interest of the Sevys, and that Associates may foreclose the Sevys' security interest in accordance with Article 9 of the Utah Uniform Commercial Code. The order of the district court is therefore affirmed.[12]

Dean E. Conder, Judge

WE CONCUR:
Regnal W. Garff, Judge
Pamela T. Greenwood, Judge

1. Dean E. Conder, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(1)(j) (1987).
2. Irrigation companies are a common legal means of owning and distributing irrigation water in Utah. Many of them began as cooperative enterprises by early settlers and eventually took corporate form, usually on a not-for-profit basis. The ownership of stock in such a company typically gives the stockholder the right to receive a part of the company's water proportionate to the amount owned. The ownership of stock in the irrigation company thus becomes in some respects tantamount to ownership of the water rights themselves.
3. Associates argues that the notice of appeal is untimely, based on the fact that the date stamped on the judgment as the date of entry was altered. There is no claim, however, of unauthorized tampering with the court records, or even of error in showing the date of entry as November 4, 1987. We therefore conclude that the notice of appeal was timely filed.
4. *Compare* Utah Code Ann. §78-2-2 with Utah Code Ann. §78-2a-3 (1988).
5. R. Utah Sup. Ct. 4C; R. Utah Ct. App. 4C.
6. *Wood v. Turner*, 18 Utah 2d 229, 419 P.2d 634, 635 (1966); *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964).
7. The trust deed of which the Sevys were named beneficiaries suffices as a security agreement and both parties appear to have satisfied the prerequisites of Utah Code Ann. §70A-9-203 (1980) for creation and attachment of their security interests in the stock.
8. *Roundy v. Coombs*, 668 P.2d 550 (Utah 1983); *Abbott v. Christensen*, 660 P.2d 254 (Utah 1983); *Hatch v. Adams*, 7 Utah 2d 73, 318 P.2d 633, *aff'd on reh.*, 8 Utah 2d 82, 329 P.2d 285 (1958) (decided on rehearing on the basis of the parol evidence rule) *Brimm v. Cache Valley Banking Co.*, 2 Utah 2d 93, 269 P.2d 859 (1954).
9. Utah Code Ann. §70A-9-304(1), (4) (1980); *see also* R. Henson, *Handbook on Secured Transactions* 108-110 (1973).
10. Pride *Club v. Miller*, 572 P.2d 385, 387 (Utah 1977); *see also Ellis v. Utah State Retirement Bd.*, 757 P.2d 882, 884-85 (Utah Ct. App. 1988).
11. *See*, Utah Code Ann. §70A-1-102(1) (1980) and §70A-1-102(2)(c); *Butts v. Glendale Plywood Co.* 710 F.2d 504, 506 (9th Cir. 1983).
12. Because we hold that Associates' security interest is prior to that of the Sevys, we do not reach the question of estoppel on which the district court based its decision, or the question whether the material facts concerning estoppel were in dispute so as to preclude summary judgment.

Cite as
111 Utah Adv. Rep. 65

IN THE UTAH COURT OF APPEALS

Douglas R. OLSEN,
Petitioner,
v.
INDUSTRIAL COMMISSION of Utah, Tyger Construction, Wausau Insurance Company, and Second Injury Fund,
Respondents.

No. 880407-CA
FILED: June 23, 1989

Original Proceeding in this Court

ATTORNEYS:

Jay A. Meservy, Salt Lake City, for Petitioner
Michael E. Dyer and Brad C. Betebenner, Salt Lake City, for Respondents Tyger Construction and Wausau Insurance Company
Erie V. Boorman, Salt Lake City, for Respondent Second Injury Fund

Before Judges Davidson, Bench, and Billings.

OPINION

BILLINGS, Judge:

Petitioner Douglas Olsen appeals from the